United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

NO. 77-4198

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,

Intervenor,

v.

INDEPENDENT ASSOCIATION OF STEEL FABRICATORS, INC., ET AL.,

Respondents,

and

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Intervenor,

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
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No. 77-4198

NATIONAL LABOR RELATIONS BOARD,

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SHOPMEN'S LOCAL UNION NO. 455,
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INDEPENDENT ASSOCIATION OF STEEL
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and

LOCAL 810, IBTCWHA,

Intervenor,

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

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1. The Association's reliance (Assoc. Br. 33-34) upon the comment concerning the existence of a bargaining impasse, contained in the letter from the Regional Director dismissing the Association's refusal to bargain charge against Local 455 for having signed a separate agreement with

Dextra Industries, is misplaced.[1/] The Board gave careful consideration to the import of that administrative action and concluded that the comment related to conditions as they existed on or before June 30, 1975 (A. 2127-2128). It further found that, even assuming the accuracy of that conclusory statement, Local 455's subsequent action of revising its offer on July 1, as well as the meeting and events of August, broke any impasse which could have existed at that earlier time (A. 2127). The Association's purported reliance on that letter to justify its subsequent actions (Assoc. Br. 7-8) seems doubtful. The letter referred to June 30, 1975 as the impasse date, but did not issue until November 21, 1975. By that time the Association's efforts to avoid its bargaining obligations with Local 455 were well underway, and both Greenpoint Ornamental and Roman Iron had already signed their illegal contracts with Local 810 (1041-1044). Furthermore, as the Board noted (A. 2128), such an administrative determination is not binding upon it, particularly where record evidence is to the contrary. Indeed, the General Counsel did not consider that determination dispositive of the issues in this case, since the instant complaint was subsequently issued.

1/ The full text of that letter, Respondent's Exhibit No. 8, was omitted from the printed appendix, but has been printed as an appendix to this brief.

2. The assertion in the Association's brief that "[t]he entire consensual underpinning of group bargaining having collapsed, majority withdrawal was permissible (even in the absence of impasse) . . ." not only assumes the disposition of one of the principal issues to be resolved in this proceeding, but mistates the premise for that resolution. The consensual underpinning of a multi-employer bargaining unit in a case such as this lies in the bargain struck between the majority representative of the employees of an individual employer, and that individual employer, to redefine the bargaining unit by including the employees within a broader multi-employer unit represented by that union. An association of employers can act as the agent of the employers for the purpose of collective action within the framework of the multi-employer unit established by those individual agreements, but such an association is powerless to compel acceptance of such a redefinition of the unit for bargaining, absent the consent of the employee representative. The Great Atlantic and Pacific Tea Company, 145 NLRB 361 (1963), enforced in pertinent part, 340 F. 2d 690 (C.A. 2, 1965). A similar policy of requiring consent of the individual employer and the union before recognition of a multi-employer unit pertains in representation proceedings. The Board will not conduct an election in a

multi-employer unit except where all parties have agreed to the scope of the unit, either through a demonstrated history of multi-employer bargaining; Chicago Metropolitan Home Builders Association, 119 NLRB 1184 (1957); Milwaukee Independent Meat Packers Association, 223 NLRB 922, 924 (1976); Rock Springs Retail Merchants Association, 188 NLRB 261 (1971); or by the full consent of all parties to the proceeding as to the appropriateness of the unit. Broward County Launderers and Cleaners Association, Inc., 125 NLRB 256, 257 (1959). Cf. N.L.R.B. v. Johnson Sheet Metal, Inc., 442 F. 2d 1056, 1060 (C.A. 10, 1971); N.L.R.B. v. Local 210, International Brotherhood of Teamsters, 330 F. 2d 46 (C.A. 2, 1964).

As was pointed out in the Board's main brief (p. 35, 51), the Supreme Court in N.L.R.B. v. Truck Drivers Local 449 (Buffalo Linen), 353 U.S. 87, 94-96 (1957) has recognized the mutual bargaining relationship advantages which a union and an employer seek and obtain in agreeing to bargain in a multi-employer unit. The decision to agree to such a redefinition of the bargaining unit is a significant one, in which inherent limitations and responsibilities are assumed by the parties which may offset the advantages in some respects. N.L.R.B. v. Tulsa Sheet Metal Works, 367 F. 2d 55, 58 (C.A. 10, 1966). But once the bargain has been struck,

the parties are entitled to the benefits of their bargain, absent an agreed relinquishment of it, or an escape from it by one of the parties in a timely and orderly fashion.

The "consensual underpinning" of the multi-employer bargaining relationship in this case did not "collapse", as stated by the Association (Assoc. Br. 42). It was deliberately destroyed by the illegal and unilateral actions of the Association and its employer-members which are chronicled in the Board's decision and detailed in the brief on behalf of the Board. This entire case is about whether such broad unilateral actions to destroy the multi-employer unit - and to deny to Local 455 the benefits of the bargain it struck when it agreed to bargain on a multi-employer basis - can succeed.

The Association and employer-members who withdrew bargaining authorization from the Association should not be permitted to interpose that ineffective withdrawal, and the limitations of the Association By-laws, to reject the results of good faith actions of those employers who continued to recognize their obligation to bargain with Local 455 as representative of the employees in the agreed upon multi-employer unit. The fact that those employers who continued negotiating misunderstood the full extent of their obligations, and

sought to unilaterally redefine the unit in which bargaining was to take place by disclaiming authority to bargain on behalf of the Association, does not detract from the binding nature of their action in consummating the contract.[2/] Unilateral redefinition of the unit by that disclaimer is no less an attempted unilateral withdrawal from the multi-employer unit than the actions taken by the employer-members who attempted to withdraw by the January 16 letter.

Both violations found by the Board to have been committed by the Association and its employer-members - the refusal to recognize and bargain because of the withdrawal of bargaining authority from the Association and the refusal to honor and implement the contract - are premised upon the same basic consideration. That consideration is the necessity of protecting the integrity of the multi-employer bargaining unit in order to preserve for both parties the advantages for which they had bargained when they initially agreed to its establishment (A. 2143-2144). By failing to execute and

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2/ It is to be noted that the basic provisions of that contract differed in several respects, favorable to the employers, from those of the standard independent contract proposed by Local 455 (Bd. Br. 24). The 56 differences between the Allied contract and the standard independent agreement had developed in just such a manner, a few at a time over successive negotiations.

implement the contract embodied in the January 23, 1976 stipulation, the Association and the employer-members have reneged on that bargain, and thereby violated the policy and principles underlying Section 8(a)(5) of the Act. consideration. That consideration is the necessity of protecting the integrity of the multi-employer bargaining unit in order to preserve for both parties the advantages for which they had bargained when they initially agreed to its establishment (A. 2143-2144). By failing to execute and implement the contract embodied in the January 23, 1976 stipulation, the Association and the employer-members have reneged on that bargain, and thereby violated the policy and principles underlying Section 8(a)(5) of the Act.

3. The evidence relevant to the Association's contention that Local 455 should be denied the benefit of a bargaining order because it had engaged in violence during the strike which evidenced a disinterest in enforcing its representation rights through peaceful legal processes (Assoc. Br. 57-59), was carefully considered and evaluated by the Board (A. 2114-2123, 2137-2140).[3/] That contention was rejected, however,

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3/ A proceeding against Local 455 on a complaint alleging violations of Section 8(b)(1)(A) by various threats of violence and destruction of property was consolidated with the proceeding against the employers to permit full consideration of this defense to entry of a bargaining order (A. 2088).

by the Board's finding that there was no "evidence of a deliberate plan or policy on the part of Local 455 by intimidation or violence to ensure to Local 455 continued adherence by its members or to force the Employers or the Association to capitulate to its demands (A. 2140).

In Laura Modes Co., 144 NLRB 1592 (1963), and subsequent cases the Board has emphasized, with court approval, that the withholding of an otherwise appropriate bargaining order because of union misconduct is an "extraordinary sanction", and that the usual and preferred remedies for union misconduct are to be found in Section 8(b) of the Act. Donavan v. N.L.R.B., 520 F. 2d 1316, 1321, 1323 (C.A. 2, 1975), cert. denied, 423 U.S. 1053, and the underlying Board decision, New Fairview Convalescent Home, 206 NLRB 688, 689 (1973). Also, in determining whether such an extreme sanction is warranted, the gravity of the union's actions, and the likelihood of their repetition, must be weighed against the employer's concomitant unfair labor practices. See, e.g. Donavan v. N.L.R.B., supra, 520 F. 2d at 1320-1322; N.L.R.B. v. World Carpets of New York, 463 F. 2d 57, 62 (C.A. 2, 1972); N.L.R.B. v. Triumph Curing Center, ___ F. 2d ___, No. 76-2884, March 2, 1978, slip op. p. 24 (C.A. 9). In cases

of this nature, as this Court has noted, it is appropriate for the reviewing court to "defer to the Board's approach in refusing to view individual factual incidents apart from their larger framework, and its ultimate resolution of the mixed question whether the union's activities on the whole were of a kind that should preclude a bargaining order." Donavan v. N.L.R.B., supra, 520 F. 2d at 1323 and cases cited.

It is readily apparent that the Board's conclusion that the union's actions were not of such a character as to warrant withholding of a bargaining order is correct on this record. Except for a few incidents at Trojan Steel, where the picket line situation was exacerbated after October 10, 1975, when a picketing striker was hit by the rear of a truck being driven by Trojan Steel President Feinglass (A. 2120-2123), most of the incidents complained of occurred subsequent to the January 16, 1976 withdrawal from multi-employer bargaining of the 17 employers (A. 2114). Few had occurred during the six months of the strike preceding that precipitate action of the employers. The incidents involved only 6 of those 17 employers, and only as to 3 was the conduct found to have been violative of Section 8(b)(1)(A) (A. 2138). Each of those three employers, Koenig, Long Island and Greenpoint, had at the time of the incidents signed the illegal

contracts with Local 810 (A. 2138), and that undermining of Local 455's status as representative was properly considered by the Board as a consideration relevant to the view to be taken of Local 455's actions. Cf. N.L.R.B. v. Triumph Curing Center, supra, ___ F. 2d ___, slip op. at 27. It is to be noted that none of the incidents were of sufficient concern to either the Association or the employers for them to initiate recourse to the legal processes of the Board by filing charges against Local 455. Rather, it was Local 810, with illegal contracts to protect, which filed the 8(b)(1)(A) charges on April 14, 1976.

The Board fully recognized that the conduct of Local 455 was in some instances "far less than exemplary" (A. 2137), and did not condone it, but the balance struck by the Board in refusing to invoke the "extraordinary sanction" of a bargaining order in favor of Local 455, should be affirmed by the Court.

4. The contention of the Association that the offer of the striking employees to return to work was not unconditional (Assoc. Br. 13, 61-63) misreads the basis for the Board's finding that there was an unconditional offer. The Association's contention is based upon an excerpt from the testimony

of Local 455 Business Agent Matienzo concerning his conversation with Bronston of Achilles Construction. That conversation took place in early February ("about a week or 10 days after" the stipulation was signed on January 28 (963)), at least three weeks before the February 27 letter from Local 455 which was found by the Board to be an unconditional offer commencing backpay liability. See Bd. Br. 27. Any ambiguities in that earlier conversation were certainly resolved by the unambiguous nature of the offer made by the letter.

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April 1978

NATIONAL LABOR RELATIONS BOARD

REGION 2

Federal Building, Room 3614, 26 Federal Plaza

New York, New York 10007

Telephone 264-0300

November 21, 1975

Independent Association of Steel Fabricators
P. O. Box 333, Williamsburg Station
Brooklyn, N. Y. 11211

Attention: Irving Spigner

Re: Shopmen's Local 445, International Assoc. of Bridge, Structural & Ornamental Iron Workers (Independent Association of Steel Fabricators, Inc.
Case No: et al.) 2-CB-5985

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted.

The evidence does not tend to establish that the above-named Union violated the National Labor Relations Act, as alleged by you. With regard to your contention that the Union violated Section 8(b)(3) of the Act, no evidence was presented to establish that the Union refused to bargain with your association. Rather, the evidence establishes that collective bargaining negotiations took place between the parties for some time prior to June 30, 1975, at which time a legitimate impasse was reached and negotiations ceased. To the extent that your charge is predicated upon a contention that the Union violated Section 8(b)(1)(3) of the Act in that it negotiated with a member-employer of your association subsequent to June 30, 1975, the investigation revealed no evidence that the Union engaged in conduct designed to undermine your association. Rather, the member-employer withdrew from your association subsequent to the collapse of negotiations and chose to negotiate with the Union on an individual basis. I therefore am refusing to issue a complaint herein.

GPO 951-367

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on December 4, 1975 Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

Sidney Danielson
Regional Director

Enc.

REGISTERED MAIL
R.R.R.

cc: General Counsel
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UNITED STATES COURT OF APPEALS
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v.	:	No. 77-4198
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Respondents,	:	
and	:	
LOCAL 810, IBTCWHA,	:	
Intervenor,	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Board's reply brief, in the above-captioned case, has this day been served by express mail upon the following counsel at the addresses listed:

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Dated at Washington, D.C.

this 4th day of April, 1978

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